SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRI-CITY, LLC; and ENDOR CAR AND DRIVER, LLC, Petitioners, v. NEW YORK CITY TAXI AND LIMOUSINE COMMISSION and MEERA JOSHI, in her official capacity as Chair, Commissioner, and Chief Executive Officer of the New York City Taxi and Limousine Commission, Respondents.	Index No.: __________ Hon. **VERIFIED ARTICLE 78 PETITION**

Petitioners Tri-City, LLC and Endor Car and Driver, LLC (collectively, "Petitioners"), by and through their undersigned attorneys, for their Verified Petition, allege as follows:

INTRODUCTION

1. Petitioners bring this lawsuit to challenge an arbitrary and capricious law passed by the New York City Taxi and Limousine Commission ("TLC") that threatens to harm drivers and riders alike by reducing driver earnings, raising rider prices, and undermining competition in the for-hire vehicle ("FHV") industry.

2. On August 8, 2018, the New York City Council passed Local Law 150 of 2018, which directed the TLC to pass rules establishing a "method for determining the minimum payment that must be made to a for-hire vehicle driver." In response to this directive, on December 4, 2018, the TLC passed a rule (the "Minimum Payment Rule") requiring that FHV bases which on average dispatch ten thousand or more trips per day must pay drivers a minimum amount *for each trip* based on a formula set out in the rule. The Minimum Payment Rule applies

to only four companies in New York City, all of which are technology and ridesharing companies, including Petitioners' parent, Lyft, Inc. The formula codified in the Minimum Payment Rule gives the largest company an automatic and perpetual advantage over smaller companies.

3. The stated purpose of the rule—to increase overall driver earnings (and in part to reduce congestion)—is laudable. But the actual rule passed by the TLC cannot stand, because it is affected by an error of law and lacks a rational basis in the record. As a threshold matter, the requirement that driver earnings be calculated on a per-trip basis (the "Per-Trip Calculation Requirement")—to the exclusion of a *per-week* calculation option—is in direct conflict with Local Law 150. Local Law 150 expressly provides that any FHV minimum earnings rule passed by the TLC cannot prevent payments to FHV drivers from being calculated on a *weekly* basis. The Minimum Payment Rule does precisely that, and should be vacated on that ground alone.

4. Furthermore, there is no support in the administrative record before the TLC for requiring the calculation of driver earnings on a per-trip basis to the exclusion of a per-week calculation option. The study published in July 2018 by Dr. James A. Parrott and Dr. Michael Reich (the "P&R Study"), the TLC's sole purported support for the Minimum Payment Rule at the time the rule was passed, does not analyze the appropriate temporal period for calculation of minimum earnings, and to the extent it even references such a period, the study contemplates that the appropriate temporal period for the calculation is a week or a month—*not* a trip. The Per-Trip Calculation Requirement was essentially plucked out of thin air by the TLC, with no support from Parrott and Reich and no analysis of its effects.

5. On January 16, 2019—over six weeks *after* the TLC passed the Minimum Payment Rule—the TLC issued a *post-hoc* supplemental report by Parrott and Reich (the

"Supplemental Report") that makes some reference to a per-trip calculation method. But that report, apart from being outside the administrative record, does not provide any support for the requirement either; in fact, Parrott and Reich continued to peg their analysis to *weekly* numbers, not even incorporating the Per-Trip Calculation Requirement they purported to analyze.

6. Further, both the P&R Study and the Supplemental Report are plagued by deficiencies, mistakes, and incorrect assumptions that render the analysis incapable of supporting the Minimum Payment Rule or its Per-Trip Calculation Requirement. As explained in detail in the report submitted in connection with this petition by Dr. Catherine Tucker[1], the Sloan Distinguished Professor of Management Science at MIT Sloan at the Massachusetts Institute of Technology, Parrott and Reich's analysis is not based on sound economic methodology, containing errors as fundamental as the ignoring of core tenets of supply and demand. Riddled as it is with flaws and inaccurate assumptions, Parrott and Reich's work is inherently unreliable and cannot support the TLC's rulemaking.

7. The Minimum Payment Rule and its Per-Trip Calculation Requirement are also not rationally related to the TLC's stated purpose in passing the rule. Indeed, the rule likely will result in *decreased* overall gross driver compensation, an outcome predicted even by Parrott and Reich's own report when the deficiencies in it are corrected. In short, while increasing driver earnings is a worthy objective (and one Petitioners do not challenge), the rule the TLC actually passed is not reasonably designed to achieve that goal. The rule, moreover, is likely to encourage shorter trips in areas of high demand, thus *increasing* congestion in the City and defeating the purported secondary purpose of the rule.

[1] The Expert Report of Dr. Tucker (the "Tucker Report") is attached to the Affirmation of Sara L. Shudofsky In Support of Petitioners' Article 78 Petition and Application For A Temporary Restraining Order and Preliminary Injunction ("Shudofsky Aff.") as Exhibit ("Ex.") A.

8. Finally, the rule passed by the TLC arbitrarily treats companies differently based on how often drivers on the platform have a rider in their vehicle (referred to as the "utilization rate"). Instead of setting an industry-wide utilization rate that will at all times apply equally to each of the four ridesharing companies, the rule allows any company to use its own company-specific utilization rate. That approach was adopted without any study or analysis by the TLC of its likely effects. In the TLC's haste to pass the Minimum Payment Rule, it adopted an approach that will give the largest company with the biggest market share a built-in and perpetual advantage over companies with lower utilizations, helping that company undercut its competitors on price, with the inequality compounding over time. The utilization rate component of the driver pay formula, adopted without any study of these potentially devastating anti-competitive effects, was the product of arbitrary rulemaking.

9. Because the Minimum Payment Rule directly conflicts with local law, is based on a deficient study that does not support the rule, its Per-Trip Calculation Requirement, or its utilization rate component, and is not reasonably related to the goal it purports to achieve, the Court should, for all the reasons discussed below, declare that the rule was affected by error of law and passed arbitrarily and capriciously, and vacate it.

PARTIES

10. Petitioners Tri-City, LLC and Endor Car and Driver, LLC are wholly owned subsidiaries of Lyft, Inc. ("Lyft"), a technology company headquartered in San Francisco, California. Petitioners are each licensed as a black car base by the TLC, but they operate under the same public-facing trade, business, or operating name—Lyft—and collectively dispatch over the ten thousand trips per day required to come under the Minimum Payment Rule.

11. Respondent New York City Taxi and Limousine Commission is an administrative agency of the City of New York created and operating pursuant to Chapter 65 of the New York City Charter. *See* NYC Charter § 2300. The TLC's principal office is located at 33 Beaver Street, New York, New York 10004.

12. Respondent Meera Joshi is the Chair of the TLC, as well as a Commissioner and its Chief Executive Officer, and was so at the time the TLC promulgated the Minimum Payment Rule. Chair Joshi's principal office is located at 33 Beaver Street, New York, New York 10004.

JURISDICTION AND VENUE

13. This court has subject matter jurisdiction to decide this petition pursuant to CPLR § 7803, as the Minimum Payment Rule was a final determination of the TLC and this Petition challenges that determination as arbitrary and capricious and as affected by error of law.

14. Venue is proper in New York County Supreme Court pursuant to CPLR §§ 506(b) and 7804(b) because the challenged determination occurred in New York County and Respondents' principal offices are in New York County.

FACTS

A. THE FHV INDUSTRY GENERALLY

15. The TLC regulates the taxi and FHV industries in New York City, which largely consist of the following segments: medallion taxis or yellow cabs; street hail liveries or green cabs; and FHVs. Although all segments are regulated by the TLC, each must comply with a unique set of regulatory requirements.

16. Petitioners, though wholly owned subsidiaries of a technology company, are both regulated by the TLC as part of the FHV industry, which consists of for-hire bases, for-hire vehicles, and for-hire drivers. *See* 35 R.C.N.Y. § 59B-03.

17. "A For Hire Base can be any of the following: (1) A Black Car Base, (2) A Livery Base (or Base Station), (3) A Luxury Limousine Base." *See* 35 R.C.N.Y. § 59B-03(f).

18. Petitioners are licensed to operate in New York City as black car bases.

19. All rides provided by the FHV industry "must be arranged through a TLC-licensed base and performed by TLC-licensed drivers in TLC-licensed vehicles." *Current Licenses*, NYC.GOV, http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml.

20. Unlike the medallion taxi segment, FHV rides must be pre-arranged, *see* 35 R.C.N.Y. §§ 59B-03(c), (m), (p), and FHV bases have the discretion to set their own rates of fare.

21. Recently, the FHV industry has been further segmented by the creation of a new licensing category for High Volume For-Hire Services. While the TLC has yet to issue any High Volume For-Hire Service licenses, any business "that facilitates or otherwise connects passengers to for-hire vehicles by pre-arrangement, including through one or more licensed For-Hire Vehicle Bases, using a passenger-facing booking tool, and that dispatches or facilitates the dispatching of ten-thousand (10,000) or more trips in the City per day" will be required to obtain a High Volume For-Hire Service license from the TLC. *See* 35 R.C.N.Y. § 51-03.

22. Currently, the only businesses that will be required to obtain such a license are four technology and ridesharing companies operating in New York City, including Petitioners' parent, Lyft.

23. These technology and ridesharing businesses have enjoyed an enormous amount of popularity since entering the New York City market and now account for more than 80% of all FHV trips, approximately 50% of which serve riders in the outer boroughs—areas of the City almost completely neglected by the medallion taxi industry. *See* NYC TAXI & LIMOUSINE

COMMISSION, 2018 TLC FACTBOOK 1, 5 (2018), http://www.nyc.gov/html/tlc/downloads/pdf/2018_tlc_factbook.pdf.

24. Further, approximately 25% of rides fulfilled by FHV bases affiliated with these technology and ridesharing companies are shared rides—a form of carpooling in which multiple riders heading in the same direction share the same vehicle. *Id*. at 9.

25. Since entering the New York City market, ridesharing businesses, such as Lyft, have provided tens of thousands of New Yorkers with earning opportunities and access to transportation that otherwise would not have been available to them.

B. PETITIONERS' BUSINESS MODEL

26. Petitioners, as is typical of any black car base, operate under a business model pursuant to which their affiliated drivers own, lease, or rent the vehicles the drivers use, and the drivers are independent contractors—not employees.

27. As independent contractors, drivers have the flexibility to set their own work schedules, choose where to drive, decide which rides to accept, choose their own cars, and contract with other companies, including as drivers affiliated with other rideshare companies. Indeed, approximately half of all drivers are multi-app users that network with riders using more than one ridesharing platform. P&R Study at 21, n. 17 (attached to Shudofsky Aff. as Ex. B).

28. Drivers dispatched by Petitioners' bases utilize the Lyft Platform, an online smartphone application platform that connects users seeking rides with independent contractor drivers seeking to provide rides.

29. As contractually agreed upon, drivers using the Lyft Platform are entitled to a Driver Fare. *See Lyft Driver Addendum* ¶ 1, LYFT (Nov. 28, 2018), https://www.lyft.com/terms/driver-addendum. The Driver Fare for a completed ride consists of a

base fare amount plus incremental amounts based on the actual time and distance of the ride (respectively herein, the "time rate" and the "distance rate"), as measured by Lyft. *Id*.

30. The "base fare" is the initial fare paid to a driver when a ride starts. The base fare for Lyft in New York City for standard vehicle types varies based on when a driver applied to the platform: $1.832 for drivers who applied before 12 am January 1, 2016 and $1.7175 for drivers who applied after that date.

31. The "time rate" is the fare paid to a driver per minute of the ride. The time rate for Lyft in New York City for standard vehicle types varies based on when a driver applied to the platform: $0.256 per minute for drivers who applied before 12 am January 1, 2016 and $0.24 per minute for drivers who applied after that date.

32. The "distance rate" is the fare paid to a driver per mile of the ride. The distance rate for Lyft in New York City for standard vehicle types varies based on when a driver applied to the platform: $1.264 per mile for drivers who applied before 12 am January 1, 2016 and $1.185 per mile for drivers who applied after that date.

33. In addition, drivers on the Lyft Platform have the opportunity to earn various incentives. Incentives available in the New York City market include the following: Prime Time; Power Zones; Ride Challenges; Ride Streaks; and Earnings Guarantees.

34. Prime Time adds a percentage to the Driver Fare (the base fare + the time rate + the distance rate) when the demand for rides is higher than the number of available drivers on the road in a particular area. This serves to re-balance the market, by increasing supply and reducing demand, through temporarily higher fares. Prime Time applies on a per-trip basis based upon real time market conditions. *See Prime Time for Drivers*, LYFT, https://help.lyft.com/hc/en-us/articles/115012926467-Prime-Time-for-drivers.

35. Power Zones, similar to Prime Time, adds a percentage to the Driver Fare on a per trip basis, but unlike Prime Time, Power Zones is not based on real time market conditions. Instead, Power Zones is activated by Lyft for certain areas at Lyft's discretion and can be used to encourage additional drivers to service particular areas and at particular times. *See Power Zones*, LYFT, https://help.lyft.com/hc/en-us/articles/115012926807-Power-Zones.

36. Ride Challenges allows a driver to earn an additional amount by completing a certain amount of rides in a set amount of time. Both the amount of rides and the amount of time vary depending on the incentive, as does the amount that can be earned for completing the challenge. *See Ride Challenges*, LYFT, https://help.lyft.com/hc/en-us/articles/360001943867-Ride-Challenges.

37. Ride Streaks rewards drivers for completing a certain number of trip requests in a row. Completion of the required streak results in the payment of a bonus to the driver. *See Streak Bonus*, LYFT, https://help.lyft.com/hc/en-us/articles/115015748908-Streak-Bonus.

38. Earnings Guarantees allows drivers to earn a guaranteed amount for completing a set amount of rides in a set amount time. If the guaranteed amount is not earned during the set time period despite the driver achieving the required number of rides, Lyft pays the driver the difference between the guaranteed amount and the amount actually earned by the driver. *See Earnings Guarantee Promotions*, LYFT, https://help.lyft.com/hc/en-us/articles/115012927247-Earnings-Guarantee-promotions.

39. Riders are charged for applicable tolls, airport fees, state or local fees, surcharges, or taxes required by law or agreements with third parties. Drivers do not pay these amounts. *See Lyft Driver Addendum* at ¶ 4.

40. In exchange for their use of the Lyft Platform, two fees are subtracted from the per-trip amount paid by riders. These two fees are a Service Fee and a Platform Fee (collectively referred to as a "commission" by Parrott and Reich). The Service Fee is a set amount retained by Lyft for each ride that helps finance Lyft's operational costs. *See Lyft Driver Addendum* at ¶ 5; *How Your Pay Is Calculated*, LYFT, https://thehub.lyft.com/pay-breakdown. The Platform Fee is a variable amount equal to the difference between the fees charged to the rider (*e.g.*, the rider fare) and the sum of the Driver Fare, any applicable bonuses or incentives, any applicable tolls, surcharges, taxes or other third party fees, and the Service Fee. *Id*.

41. In addition, the Lyft Platform provides riders with the ability to tip drivers. 100% of tips are passed on to the driver. *Lyft Driver Addendum* at ¶ 4.

42. Driver earnings per-ride therefore are equal to Driver Fare + incentives + tip. The more rides a driver completes, the more the driver earns overall.

43. Lyft facilitates payments to drivers through a third-party payment processor, collecting fees from both the rider and driver. *See Lyft Driver Addendum* at ¶ 3. Lyft remits to the drivers the amount they are owed weekly; however, eligible drivers can opt into Express Pay, which allows them to cash out certain earnings before their usual weekly deposit for a $0.50 transaction fee, up to five times a day. *See Express Pay*, LYFT, https://help.lyft.com/hc/en-us/articles/115012923167-Express-Pay.

C. THE NEW YORK CITY COUNCIL REQUIRES THE TLC TO PERMIT THE CALCULATION OF DRIVER MINIMUM EARNINGS ON A PER-WEEK BASIS

44. On April 30, 2018, the NYC Council Committee on For-Hire Vehicles held a hearing to consider the adoption of a number of bills, including Int. No. 890, which would direct the TLC to establish a method for determining a minimum payment rule for FHV drivers dispatched by a high volume for-hire service.

45. As originally introduced by Councilmember Brad Lander, the bill would have required the TLC to amend the New York City Administrative Code to "set minimum prices for services provided by for-hire vehicle drivers who are independent contractors" at a level no less than the higher of the minimum wage for large employers in New York City and the hourly income for taxicab drivers over the previous five year period. *See* Int. No. 890 (Apr. 26, 2018) (attached to Shudofsky Aff. as Ex. C).

46. On July 27, 2018, Int. No. 890 was amended to the form that in large part would become Local Law 150 of 2018. *See* Proposed Int. No. 890-A (July 26, 2018) (attached to Shudofsky Aff. as Ex. D). Proposed Int. No. 890-A stated, in relevant part:

> The commission shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such driver. In establishing such method, the commission shall, at a minimum, consider the duration and distance of the trip, the expenses of operation to the driver, any applicable vehicle utilization standard, rates of fare and the cost of living in the city of New York.

Id. at 1.

47. Just four days later, on August 1, 2018, Int. No. 890 was amended again, resulting in the version that was signed into law by Mayor De Blasio on August 14, 2018 as Local Law 150 of 2018 ("Local Law 150"). *See* Local Laws of the City of New York for the Year 2018, No. 150 (Aug. 14, 2018) (attached to Shudofsky Aff. as Ex. E). The August 1 amendment was targeted, adding only one sentence of substance, identified in bold below:

> The commission shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such driver. In establishing such method, the commission shall, at a minimum, consider the duration and distance of the trip, the expenses of operation to the driver, any applicable vehicle utilization standard, rates of fare and the adequacy of for-hire driver income considered in relation to for-hire vehicle driver

> expenses. **Such rule promulgated by the commission shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method, provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with the method established by the commission.**

Proposed Int. No. 890-B (Jul. 31, 2018), at 1 (attached to Shudofsky Aff. as Ex. F) (emphasis added); Ex. E to Shudofsky Aff.

48. Accordingly, the language in Local Law 150 requires the TLC to permit the calculation of payments to drivers on both an hourly ***and weekly*** basis (or by any other methods). Ex. E. As discussed below, the TLC ignored the weekly basis requirement in formulating and adopting the Minimum Payment Rule.

D. THE TLC ARBITRARILY ADOPTS THE MINIMUM PAYMENT RULE IN CONTRAVENTION OF LOCAL LAW 150 AND BASED ON A FLAWED STUDY

1. THE TLC IGNORES THE PLAIN LANGUAGE OF LOCAL LAW 150 REQUIRING THE TLC TO PERMIT THE CALCULATION OF DRIVER EARNINGS ON A PER-WEEK BASIS

49. On August 28, 2018, two weeks after Local law 150 was enacted, the TLC published a Notice of Public Hearing and Opportunity to Comment on the Per-Trip Minimum Earnings Rule. The TLC published the following formula for comment, which it described as a "minimum ***per-trip*** payment formula"[2]:

$$\text{Non-WAV Per Trip Driver Pay} = \left(\frac{\$0.580 \times \text{Trip Miles}}{\text{Company Utilization Rate}}\right) + \left(\frac{\$0.287 \times \text{Trip Minutes}}{\text{Company Utilization Rate}}\right) + \text{Shared Ride Bonus}$$

NYC Taxi & Limousine Commission, Notice of Promulgation of Rules, City Record, Official Journal of New York City (Aug. 28, 2018), at 4702 (attached to Shudofsky Aff. as Ex. G).

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[2] A separate formula was also published for drivers utilizing wheelchair accessible vehicles.

50. The rule published by the TLC required a per-trip calculation consisting of $0.580 per mile to cover driver expenses (later increased to $0.631) plus $0.287 per minute driving a rider to compensate drivers for such time (plus additional paid time off and working time without a rider), the sum of which would be divided by "the Company Utilization Rate." *Id*. The Company Utilization Rate was specific to each ridesharing company, such as Petitioners' parent, Lyft, and was supposed to measure the percentage of total work time during which a driver has a rider in his vehicle. P&R Study at 11. The formula also called for an undetermined amount to be added for each shared ride provided by the driver. Ex. G to Shudofsky Aff. at 4702.

51. The formula was aimed at creating an estimated typical net income of $17.22 per hour for drivers. Ex. G to Shudofsky Aff. at 4702. $17.22 an hour was selected by the TLC as the independent contractor equivalent to the minimum wage of $15 an hour plus "the 7.65 percent ($1.32 per hour) drivers must pay in payroll taxes . . . plus 6 percent ($0.90 per hour) for paid time off." *Id*.

52. Because the TLC's formula was constructed on a per-minute and per-mile basis, it could have been applied to the total number of minutes and miles over the period of a week (or any other period of time). The rule published by the TLC, however, provides **no mechanism** to calculate driver pay on a weekly basis. As stated in the Notice of Promulgation, "The policy establishes a means for determining the minimum amount the Largest FHV Companies must pay a driver ***per trip***." Notice of Promulgation, New York City Taxi & Limousine Commission (Dec. 4, 2018), at 3 (attached to Shudofsky Aff. as Ex. H) (emphasis added). The text of the

administrative code that the rule amends requires that the minimum payment amounts be paid "for each trip dispatched by the Base." *See* 35 R.C.N.Y. § 59B-24(a).[3]

2. THE MINIMUM PAYMENT RULE WAS BASED ON THE P&R STUDY, WHICH CONTEMPLATES THAT CALCULATION OF DRIVER EARNINGS SHOULD BE MADE ON A PER-WEEK OR LONGER BASIS

53. The record that was before the TLC when it promulgated the Minimum Payment Rule supported allowing driver earnings to be calculated on a weekly (or longer) basis. In other words, it supported multiplying the per-mile and per-minute rates in the Minimum Payment Rule over a period of time greater than a trip to ensure that payment over that set period of time met the requirement of the payment minimum in the aggregate, rather than on a per-trip basis.

54. The TLC's sole purported support for the Minimum Payment Rule is the P&R Study. But nothing in the P&R Study required their per-minute per-mile formula to be applied on a per-trip basis. In fact, the P&R Study itself contemplated that calculation of driver earnings should be made on a per-week or longer basis. As noted at the outset of the study:

> Drivers would receive a minimum payment per mile and per minute spent transporting passengers. FHV bases would be required to ensure that drivers to whom they dispatch trips do not fall below these minimums **over a set period of time**.

P&R Study at 3 (emphasis added).

55. Later on in the report, Parrott and Reich reiterated their assumption that the set period of time for the calculation of driver earnings would be a week or a month—and *not* a trip:

> Generally, for a set time period **(such as a week or a month)**, companies will evaluate each driver's earnings using the total trip mileage and trip minutes for that company. If the compensation provided to a driver falls below the minimum pay standard, the companies will be required to make up the difference.

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[3] As discussed, the rule also provides for a per-hour calculation option. *See* 35 R.C.N.Y. § 59B-24(a)(5).

Id. at 36 (emphasis added).

56. Further, Parrott and Reich themselves used a "simulation" based on *weekly* averages. In setting up the simulation in this manner, the P&R Study did not even consider, much less evaluate, the potential distorting effects that the Per-Trip Calculation Requirement will have on driver earnings and the industry as a whole.

57. While the P&R Study notes in passing that the rule proposed by the TLC is a per-trip formula, it neither analyzes nor recommends the Per-Trip Calculation Requirement. In short, there is simply nothing in the P&R Study that provides a basis for establishing a Per-Trip Calculation Requirement as opposed to a payment calculation over any other time period.

3. THE P&R STUDY IS FUNDAMENTALLY FLAWED

58. Following passage of the Minimum Payment Rule, Petitioners engaged Dr. Catherine Tucker, the Sloan Distinguished Professor of Management Science at MIT Sloan at the Massachusetts Institute of Technology, to evaluate the P&R Study, as well as the economic merits of calculating the Minimum Payment Rule on a per-trip basis and using a company-specific utilization rate. Dr. Tucker's academic specialty focuses on platform businesses such as Petitioners'—businesses that facilitate exchanges between two or more interdependent groups, here drivers and riders. Dr. Tucker's report dated January 29, 2019 is incorporated into this petition. *See* Tucker Report (attached as Ex. A to Shudofsky Aff.)

59. Dr. Tucker's review and analysis of the P&R Study highlights the study's glaring flaws and its unreliability as the basis for the Minimum Payment Rule, the Per-Trip Calculation Requirement, and the utilization component of the formula. In particular, Dr. Tucker reaches five overarching conclusions:

a. The P&R Study is ***unreliable***, *see id*. at ¶¶ 12-14 (emphasis added);

b. Parrott and Reich's own simulation, correcting for certain miscalculations and conceptual errors, predicts that **the Minimum Payment Rule will *decrease* driver gross driver earnings**, *see id*. at ¶¶ 15-17 (emphasis added);

c. The Per-Trip Calculation Requirement of the Minimum Payment Rule does not make economic sense, *see id*. at ¶¶ 18-19;

d. The Per-Trip Calculation Requirement of the Minimum Payment Rule is likely to create distortions that will ***hurt*** **drivers and riders**, *see id*. at ¶¶ 20-22 (emphasis added); and

e. Relying on platform-specific utilization rates may have the unintended effect of ***reducing*** competition. *Id*. at ¶¶ 23-27 (emphasis added).

Each is discussed in detail below.

a. THE P&R STUDY IS UNRELIABLE

60. Parrott and Reich attempted in their study to estimate certain inputs that are the building blocks for their analysis of the Minimum Payment Rule. These inputs are drivers' earnings, working time, and expenses. Tucker Report at ¶ 40. Parrott and Reich used these inputs both to calculate drivers' net earnings and to establish the expense component used in the Minimum Payment Rule. After reviewing these inputs, Dr. Tucker concludes that Parrott and Reich overstated expenses, leading to an underestimate of drivers' net earnings and an overestimate of the average per-mile expense, which directly inflates the expense component of the Minimum Payment Rule. *Id*. at ¶¶ 13, 59-77.

61. The unreliability of the P&R Study is further reinforced by the flaws in the "simulation" run by Parrott and Reich that purports to evaluate the effects of the Minimum Payment Rule.

62. **First**, the "simulation" run by Parrott and Reich is not a true simulation because it assumed outcomes, the validity of which are not tested by Parrott and Reich. Specifically, Parrott and Reich present seven fictional scenarios in which they assume, rather than forecast,

the changes in rider fares and rideshare company commissions that the Minimum Payment Rule will cause. Tucker Report at ¶¶ 81-83; *see* P&R Study at 53-62. As a result, Parrott and Reich's conclusion that the Minimum Payment Rule will benefit drivers is merely imposed by the authors without basis and is not derived from economic modelling. Tucker Report at ¶¶ 81-83; *see* P&R Study at 68.

63. **Second**, Parrott and Reich do not even attempt to account for the effects of the Per-Trip Calculation Requirement in the P&R Study. Tucker Report at ¶¶ 79-80. Instead, their "simulation" is based on weekly averages that are unable to account for the market distortions specific to the per-trip formulation. *Id*. An accurate simulation of the Minimum Payment Rule and the Per-Trip Calculation Requirement would need to reflect that the changes in driver pay caused by the rule vary depending on the trip, its distance, its time, and whether it is occurring on- or off-peak. *Id*. at ¶¶ 79-80. This is because the Minimum Payment Rule and the Per-Trip Calculation Requirement do not uniformly affect each trip performed by a driver. The effect will vary based on the characteristics of the trip described above. Using a weekly average, as the P&R Study did, does not account for this variability.

64. **Third**, Parrott and Reich's "simulation" is mathematically incorrect and ignores basic supply and demand principles of economics that are taught in introductory economics classes. *Id.* at ¶ 89. Specifically, Parrott and Reich fail to balance supply and demand in their simulation. Dr. Tucker illustrates this basic economic principle as follows:

> [I]magine a world where, for a given level of drivers' pay and riders' fare, there are 20 persons who would like a trip but only 10 drivers willing to offer a trip. In that case, only 10 trips will occur. Similarly, in a world where there are only 10 persons who would like a trip but 20 drivers willing to offer a trip, only 10 trips will occur. Parrott and Reich, by contrast, would assume that all 20 trips would occur.

Id. at ¶ 93. In short, in a platform economy the number of trips supplied cannot exceed the number of trips demanded, nor can demand exceed the supply of trips available.

65. Parrott and Reich ignore this principle in their "simulation" and instead calculate the number of trips that will be provided by drivers as a result of the Minimum Payment Rule by calculating the ***sum*** of the "Percent increase in trips provided by incumbent drivers" and the "Percent change in demand for trips resulting from fare changes." *See* P&R Study at 59, Ex. 20A, row 5. In other words, Parrott and Reich do not take the lower of the change in demand for trips and the change in supply of trips available to determine the number of trips that will be provided by the market, but instead add the change in the number of trips demanded to the change in the supply of trips available, inflating the number of trips to be provided by drivers. Tucker Report at ¶¶ 92-94. This mirrors the example provided by Dr. Tucker above. Imagine that there are currently 10 trips demanded in the market and 10 trips supplied in the market; as such there would be 10 trips that occur. However, also imagine that prices are predicted to go up and so trips demanded will fall by 5, while earnings are expected to rise so trips supplied will increase by 10. Parrot and Reich would claim that there would be an increase of 5 trips—5 lost from demand plus 10 gained from supply—leading to a total of 15 trips. But as Dr. Tucker explains, in a market with 5 trips demanded and 20 trips supplied, there could only be 5 trips that occur.

66. The result of Parrot and Reich's fundamental mistake is an inflating of the increase in gross earnings the "simulation" predicts will occur as a result of the Minimum Payment Rule. Accounting for this error alone (ignoring the other errors in the simulation discussed both above and below) results in decreasing the predicted effect the rule will have on gross driver earnings under Parrott and Reich's Scenario G (which for the reasons explained

below is the most likely scenario to occur) by $345 million—from a "predicted" increase in gross driver earnings of $335 million to a *decrease* in gross earnings of $10 million. *Id*. at ¶ 95.

67. **Fourth**, Parrott and Reich's "simulation" incorrectly accounts for the authors' own assumption regarding utilization improvement (*e.g.*, that the Minimum Payment Rule will incentivize rideshare companies to improve upon their utilization rate because it will decrease the per-trip cost for each trip). *Id*. at ¶¶ 96-101. Improvement in the utilization rate is central to Parrott and Reich's claim that the Minimum Payment Rule will benefit driver earnings, while at the same time providing the rideshare companies with the "primary means of absorbing the effect of the pay standard." P&R Study at 57. Nonetheless, Parrott and Reich make another basic error that again inflates gross driver earnings. Tucker Report at ¶ 96.

68. Specifically, Parrott and Reich fail to properly account for the relationship between their assumed increases in utilization, driver hours worked, and trip demand. Utilization can improve in two ways, either by increasing the number of rides performed by drivers in an hour or by decreasing the number of hours worked by drivers. Parrott and Reich ignore the latter possibility, despite the fact that their "simulation" predicts a decrease in demand for trips ranging from 0% to 12%. *Id*. at ¶¶ 97-98; *see* P&R Study at 59-60, Exs. 20A & 20B. For the reasons discussed above regarding the mistaken application of supply and demand, Parrot and Reich's assumption that there will be an "increase in trips provided by incumbent drivers" is incorrect, as their "simulation" predicts a *decrease* in trips demanded. Tucker Report at ¶ 98. Their assumption that utilization will improve therefore can only be true if drivers drive fewer hours.

69. This means that Parrott and Reich should have accounted for the effect that working fewer hours without increasing the amount of trips performed per-hour would have on gross driver earnings. Instead, Parrott and Reich assumed an increase in hours worked by

drivers. P&R Study at 59-60, Exs. 20A & 20B, row 1. As a result, their "simulation" once again arbitrarily inflates the predicted effect the Minimum Payment Rule will have on gross driver earnings. Tucker Report at ¶ 101.

70. **Finally**, Parrott and Reich ignore that rideshare companies, like all for-profit companies, are rational profit maximizing entities and will set rider fares and commissions accordingly. *Id*. at ¶¶ 84-88. This is another basic tenet of economics ignored by Parrott and Reich in their "simulation." Parrott and Reich assume, without any rational basis, that companies like Petitioners will absorb the costs of the Minimum Payment Rule by lowering their fees by ***approximately 50% to 80%***. *Id*. ¶ 111; P&R Study at 59-60, Exs. 20A & 20B, row 10 (emphasis added). Dr. Tucker concludes that "Parrott and Reich's assumption that such decreases in commission rates are possible, let alone 'plausible,' *lacks any basis in economics.*" Tucker Report at ¶ 112 (emphasis added).

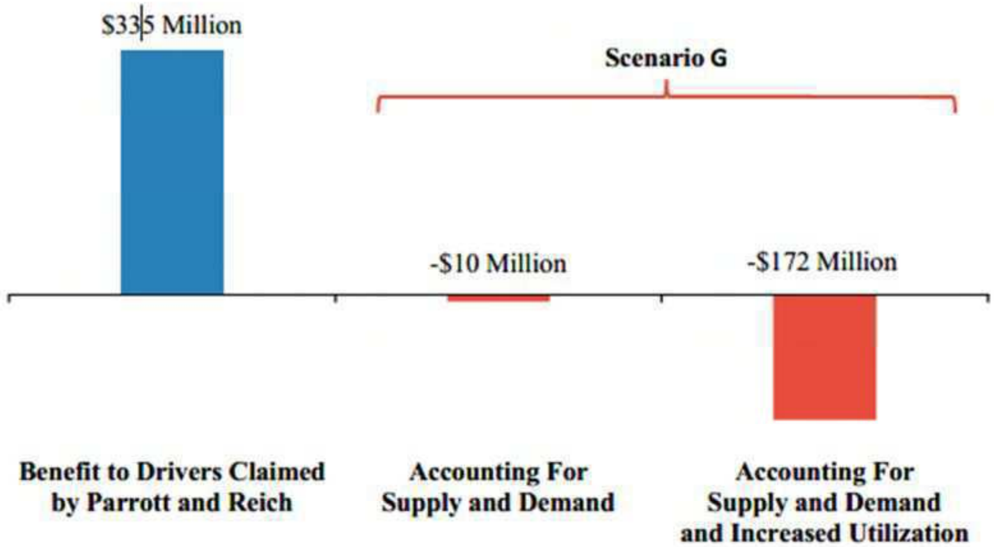
b. PARROTT AND REICH'S OWN SIMULATION, CORRECTING FOR CERTAIN MISCALCULATIONS AND CONCEPTUAL ERRORS, PREDICTS THAT THE MINIMUM PAYMENT RULE WILL ***DECREASE*** DRIVER GROSS DRIVER EARNINGS

71. Parrott and Reich ignore as "particularly unlikely" the scenario in their simulation—Scenario G—that is in fact *most likely* to occur because it results in the highest total commissions for rideshare companies. Parrott and Reich reject this choice, at least in part, because it will result in "eliminat[ing] the policy-related driver pay increase for all incumbent drivers." P&R Study at 61. That rationale, however, does not account for basic principles of profit maximization that any rational for-profit company would follow.

72. When taking into account rational profit maximization behavior (and correcting for the other errors described above), Parrott and Reich's own "simulation" predicts that the Minimum Payment Rule will most likely lead to a 10% increase in fares for riders, a fall in the

number of hours of work for incumbent drivers, and, as reflected in the below chart, ***a decrease in gross driver earnings***: .

Exhibit 6
Change in Annual Gross Driver Pay[129]



Tucker Report ¶ 101, Ex. 6.

73. In other words, an accurate simulation of the Minimum Payment Rule's and Per-Trip Calculation Requirement's effects would have revealed to Parrott and Reich and the TLC that their calculations as to the benefits of the rule were ***off by over a half billion dollars*** and that the rule will in fact result in increased rider fares and will ***not*** have its desired effect on driver earnings.

c. THE PER-TRIP CALCULATION REQUIREMENT OF THE MINIMUM PAYMENT RULE DOES NOT MAKE ECONOMIC SENSE

74. Parrott and Reich do not provide any justification for the Per-Trip Calculation Requirement, and the P&R Report does not analyze the effects that the Per-Trip Calculation Requirement will have on driver earnings, rider fares, or rideshare companies. *Id*. at ¶ 121. Indeed, one of the many flaws of the "simulation" run by Parrott and Reich is that it does not

account for the effects of the Per-Trip Calculation Requirement. *Id*. at ¶ 123. As a result, Dr. Tucker concludes that "Parrott and Reich's 'simulation' cannot form the economic basis for the Per Trip Calculation Requirement." *Id*. ¶ 124.

75. Further, Dr. Tucker concludes that the Per-Trip Calculation Requirement will likely overshoot, without any basis for doing so, the Minimum Payment Rule's target of $17.22 per-hour in average driver earnings. *Id*. at ¶¶ 130-132. That is the case because a per-trip calculation does not allow for the aggregation of driver earnings over a period of time, which would allow for certain trips to fall above and below the target amount but average out to $17.22 an hour during that time period. *Id*. Instead, through imposition of the Per-Trip Calculation Requirement, every single ride will be at least *at* the target, without the opportunity to average out the cost over a longer period of time. *Id*. There is no support in the P&R Study for exceeding the $17.22 target specifically chosen by the TLC as the independent contractor equivalent to the $15 minimum wage. Nor did Parrott and Reich analyze the effect that the Per-Trip Calculation Requirement and the overshooting of the $17.22 target will have on the industry.

d. THE PER-TRIP CALCULATION REQUIREMENT OF THE MINIMUM PAYMENT RULE IS LIKELY TO CREATE DISTORTIONS THAT WILL ***HURT*** DRIVERS AND RIDERS

76. Dr. Tucker concludes that there is "no economic rationale" for the Per-Trip Calculation Requirement, and Parrott and Reich ignored the perverse effects of such a requirement. *Id*. at Section V. In particular, Dr. Tucker notes that the Per-Trip Calculation Requirement is "likely to disproportionately affect rider fares," resulting in a decrease in the total number of trips and thereby harming drivers and reducing the overall efficiency of ridesharing platforms. *Id*. at ¶ 142. Parrott and Reich in fact concede that an increase in rider fares will

result in a decrease in demand, thereby hurting drivers. P&R Study at 57 ("If passenger fares rise, the consumer demand response is likely to reduce the number of trips demanded. Driver trips and pay will decline accordingly").

77. Dr. Tucker also concludes that the Per-Trip Calculation Requirement will "likely further exacerbate congestion in areas that are already congested." Tucker Report at ¶ 138. Dr. Tucker reaches this conclusion because the Per-Trip Calculation Requirement of the Minimum Payment Rule encourages drivers to provide as many trips as possible and also to drive more slowly. That means that drivers will be incentivized to drive in areas that already have high amounts of congestion, since drivers will experience a larger pay increase in such areas. *Id* at ¶¶ 135-140. This effect is captured by the below chart, which highlights the change in driver fares and incentives caused by the Per-Trip Calculation Requirement:

Exhibit 11
The Per Trip Calculation Requirement of the Minimum Payment Rule Increases Congestion

Id at ¶ 140, Ex. 11.

e. RELYING ON PLATFORM-SPECIFIC UTILIZATION RATES MAY HAVE THE UNINTENDED EFFECT OF ***REDUCING*** COMPETITION

78. A key feature of the Minimum Payment Rule is the utilization rate in the denominator of the formula, selected to supposedly increase the number of trips drivers perform per-hour (an incorrect assumption for the reasons discussed *supra* ¶¶ 67-69). Despite the centrality of the utilization feature in the Minimum Payment Rule and Parrott and Reich's acknowledgement that there is a risk of monopolization in the rideshare industry if one of the four companies develops "ride and driver network advantages [ ] substantial enough to deter entry by competitors," P&R Study at 42, Parrott and Reich never evaluate the effects that the Minimum Payment Rule will have on competition in the industry. *Id*. at ¶ 155.

79. According to Dr. Tucker, such an analysis would have revealed to Parrott and Reich that the use of a company-specific utilization rate risks reducing competition in the industry to the detriment of both drivers and riders. *Id*. at ¶ 157.

80. The use of a company-specific utilization rate, as opposed to an industry-wide utilization rate (a utilization rate that applies uniformly to all four rideshare companies subject to the rule), risks anti-competitive effects because it gives the largest companies with a higher utilization rate a pricing advantage over its competitors that it could use to outprice the market, attracting more riders and allowing it to further increase its utilization rate and lock in its competitive advantage. *Id*. at ¶ 166. As a result, the smaller players in the market will be trapped in a "vicious cycle" whereby the costs of complying with the Minimum Payment Rule will "further increase for the small platforms and decrease for the large platforms," resulting in decreased competition for both drivers and riders. *Id*.

81. This reduced competition is bad for everyone in the industry—drivers, riders, and rideshare companies alike— with the exception of the one largest company that is able to lock in its competitive advantage. As Dr. Tucker explains, this is because:

> [w]ith less competition, ridesharing platforms will be less likely to compete for drivers by offering lower commission rates or fewer innovative driver-friendly features. Less competition between platforms may also be detrimental to riders. With less competition, ridesharing platforms will be less likely to compete for riders by offering incentives or innovations that make ridesharing platforms more attractive to riders. Fewer riders and a reduction in the demand for trips will result in reduced earnings for drivers.

Id. at ¶ 157.

* * * *

82. In addition to the flaws identified by Dr. Tucker, Parrott and Reich themselves admit that they failed to take into account the effects that the recently passed Congestion Surcharge will have on the FHV market and driver wages when coupled with possible fare increases resulting from the Minimum Payment Rule. They did so notwithstanding their acknowledgement that the surcharge, already enacted by the state legislature, will have an impact:

> The recently enacted MTA surcharge for app services adds $2.75 per trip for vehicles entering or leaving the core Manhattan business areas. This mandate will increase passenger fares for an average trip by about 20 percent. The fare increase will generate some reduction in demand for trips in Manhattan and it will likely increase passenger sensitivity to further price increases. **The effects are not part of our analysis, as they are independent of the proposed driver pay standard.**

P&R Study at 57, n. 60 (emphasis added). While Parrott and Reich compartmentalized the effects that the Congestion Surcharge will have on the industry from the effects that the Minimum Payment Rule will have, drivers, riders, and bases will not have the same luxury in the

real world. The failure to account for how an already-passed 20% fare increase will interact with the Minimum Payment Rule is inherently unreasonable.

4. THE TLC'S REFUSAL BEFORE PASSAGE OF THE RULE TO COMPLY WITH LOCAL LAW 150 OR RECOGNIZE THE FLAWS IN THE P&R STUDY

83. On September 13, 2018, Petitioners met with the TLC to discuss their concerns with the proposed Minimum Payment Rule. Lyft submitted an overview of its concerns and potential solutions to the TLC at the meeting, including the following:

> 1. **Payments should be based on a weekly aggregate, not per-ride.** The proposed rules require the minimum-pay standard to apply to each trip, regardless of when or where it occurs. Increasing the prices on all rides, even during off-peak hours, may result in fewer trips and have the unintended effect of decreasing drivers' earning opportunities. Furthermore, the per-ride requirement could also encourage drivers to spend more time in areas of greater congestion.
>
> To address these downsides, we propose an alternative that would require the minimum pay standard to apply to drivers' weekly earnings. Ensuring that supply reflects demand by varying prices during the week is critical to achieving higher utilization rates and increased driver earnings.
>
> 2. **The TLC should use an industry-wide utilization rate, not company-specific.** Company-specific utilization rates favor the company with the highest initial utilization rates, and create the likelihood of a market monopoly. We propose an industry-wide utilization rate, which would still incentivize companies to increase utilization, without diminishing healthy competition in the high-volume FHV market.

Lyft Meeting with New York City Taxi and Limousine Commission (Sept. 13, 2018), at 1 (attached to Shudofsky Aff. as Ex. I).[4] Lyft reiterated these concerns at another meeting with the TLC held on September 19, 2018, *see* E-mail from Jessica Taylor, Senior Counsel, Lyft, to Chris Wilson, Deputy Commissioner for Legal Affairs/General Counsel, New York City Taxi & Limousine Commission (Sept. 21, 2018, 11:57 EST) (attached to Shudofsky Aff. as Ex. J), and in its written comments submitted to the TLC before the October 3, 2018 public hearing. Lyft, Inc.'s Comments on the Taxi & Limousine Commission's Proposed Regulations Regarding Driver Income & Vehicle Lease Transparency (Oct. 3, 2018) (attached to Shudofsky Aff. as Ex. K).

84. Petitioners were not the only stakeholders to voice these concerns. Via Transportation, Inc., another ridesharing company, submitted written comments to the TLC explaining that

> A [minimum payment] standard applied to every trip would make it difficult to effectively balance high demand areas and times (when drivers get paid more) with lower demand areas and times, which could lead to negative unintended consequences. For example, Via only earlier this year started providing rides in all parts of New York City. With no ability to even out pay across a week or month, it will be difficult for our platform to provide rides in less busy areas at off-peak times.

Via's Comments on the TLC's Driver Pay Proposal (Sept. 28, 2018), at 3 (attached to Shudofsky Aff. as Ex. L).[5]

85. The TLC also received two emails (one dated August 30, 2018 and the other September 14, 2018) from dave@metrobuggy.com concerning the Minimum Payment Rule,

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[4] Lyft also raised concerns regarding the proposed shared-ride bonus in the formula, emphasizing how such a bonus was essentially a tax on shared rides and how it would be a "setback to the goal of a less-congested, more equitable future for NYC." *Id*.

[5] Via also raised concerns about the impact the shared-ride bonus would have on congestion in New York City. *Id*. at 2.

respectively entitled "Potential Problem with Parrott and Reich Methodology" and "Potential Problem with Parrott and Reich Methodology, Part II." Both emails discuss serious concerns with the methodology used by Parrott and Reich, including with respect to the utilization rate component of the rule:

> The proposed Minimum Per-trip Payment Formula will drive out of the market companies with relatively low utilization rates, such as Juno.

E-mail from Dave, MetroBuggy, to Meera Joshi, Chairperson, New York City Taxi & Limousine Commission (Sept. 14, 2018, 17:51 EDT) (attached to Shudofsky Aff. as Ex. M). The email also notes that the rule "does not provide any meaningful way to alleviate traffic congestion" and that the entire rule was a "very risky strategy." *Id*. Both emails were received by Chair Joshi. *See* Ex. M to Shudofsky Aff.; E-mail from Dave, MetroBuggy, to Charles Furrey, Assistant General Counsel, New York City Taxi & Limousine Commission, and Rodney Stiles, Assistant Commissioner for Data & Technology, New York City Taxi & Limousine Commission (Aug. 30, 2018, 14:49 EDT) (attached to Shudofsky Aff. as Ex. N).

86. At the October 3, 2018 public hearing on the Minimum Payment Rule, Councilmember Lander, the prime sponsor of Local Law 150, testified that the proposed rule needed to be adjusted to allow for a payment calculation structure different from the Per-Trip Calculation Requirement in the proposed rule. Transcript of Public Hearing, New York City Taxi & Limousine Commission (Oct. 3, 2018), at 44:23-25; 45:1-16 (attached to Shudofsky Aff. as Ex. O). He specifically requested that the proposed rule be amended to permit the calculation of payments on an hourly basis. *Id*. at 45:4.

87. At the same hearing, Chair Joshi acknowledged the presence of the above concerns, in addition to others:

> A few of the issues that have been raised since publication that I want to highlight because I anticipate there will be testimony on them and that testimony will help the Commission in forming decisions that have to be made going forward. . . . Number three, will a remained increase in driver pay necessarily result in an increase in passenger fares, which could then result in declining trips and declining pay? Number four, should drivers be paid more for shared rides? Then, number five, will raising drivers' pay in shared rides require companies to raise prices and take away an affordable service for passengers in the outer boroughs? Six, should compliance with the minimum pay standard be judged on a per-week or a per-trip basis?

Id. at 10:22-25; 11:1-3; 11-25.

88. Later on in the hearing, Chair Joshi engaged Lyft VP of Government Policy Joseph Okpaku in an exchange over the Per-Trip Calculation Requirement:

> MS. JOSHI: Let me ask a question. Your proposition is that drivers should be paid -- judging whether or not drivers are paid the right amount should be done on a weekly basis, rather than a per-trip basis.
>
> MR. OKPAKU: Correct. I will note that that's explicitly noted for consideration under Intro 890(B).
>
> MS. JOSHI: Well, I disagree with you on that. I've had this --
>
> (Applause.)
>
> MS. JOSHI: Driver pay can be calculated on a monthly or weekly or hourly basis and that's --
>
> (Applause.)
>
> . . .
>
> MS. JOSHI: So, it's a reference to the model, such as Via's, where they are paid on an hourly basis. But that doesn't speak to the standard by which you judge compliance of a pay protection proposal. So, we can agree to disagree, but I disagree with you on that point. What I think is important for people to understand is the difference between a per-trip and per-week compliance. **My concern with a per-week is that you will then have incentives that are used to help you reach the minimum, rather than when you're judged on a per-trip you have to pay incentives on top of the minimum.**

. . .

> MR. OKPAKU: The concern, as I said before, with having a per-ride basis is that the reason we have so much congestion in the central business district is because drivers are able to take a series of very short, quick trips. That's exactly what a per-ride structure is going to incentivize. So, we really are concerned about the congestion aspect, as well as --
>
> MS. JOSHI: **But there may be passenger drop-off. The price goes up, you add congestion fees, which are going to be $2.50. So, it's not necessarily true that there's going to be the same amount of rides in the CBD.**
>
> MR. OKPAKU: **To the point of raising fees though, the more that you raise fees, the less demand there is going to be for services overall . . . .**

Id. at 103:12-25; 104:1-2; 8-23; 105:13-25; 106:1-7 (emphasis added).

89. As the above exchange reflects, Chair Joshi both displayed a misunderstanding of the role of incentives in the ridesharing industry—failing to recognize that many incentives apply on a per-trip basis—and conceded that the Per-Trip Calculation Requirement would lead to a decrease in the number of trips (a result that would have major negative implications on actual driver earnings).

90. Mr. Okpaku also expressed concern with the TLC's selection of a company-specific rather than industry-wide utilization rate for the denominator used in the Minimum Payment Rule. Mr. Okpaku explained that switching to an industry-wide utilization rate would avoid the creation of a winner-takes-all market for the four companies affected by the rule:

> [A] company-specific utilization creates a winner-takes-all scenario. Under the proposed rules as currently drafted, if two drivers from two different companies were to provide the same exact ride, one company would be allowed to pay their driver less than the other company.
>
> Essentially, what we are talking about is creating a different minimum-wage standard for each of the four companies. This would allow the company with the deepest pockets to take

> advantage of an equitable situation to the detriment of the smaller industry players. Ensuring competition between the high-volume for-hire vehicle companies is in the best interest of both drivers and passengers.
>
> The TLC proposal could create winners and losers, which is inherently inequitable.

Id. at 100:3-24.

91. After the hearing, the TLC made a few changes to the Minimum Payment Rule, but did ***not*** provide a mechanism to calculate payments on a per-week basis as required by Local Law 150. It did, however, provide a mechanism to calculate payments on a per-*hour* basis, as also required by Local Law 150.

92. The TLC further amended the Minimum Payment Rule to include an initial twelve-month period during which the utilization rate will be the industry-wide, as opposed to company-specific, rate:

> *Initial Utilization Rate*: For the twelve (12) months following the effective date of section 59B-24 of these Rules, the Utilization Rate for all Bases subject to subdivision (a) of this section will be the aggregate Utilization Rate of all Bases subject to subdivision (a), as calculated by the Commission. A Base subject to subdivision (1) may petition the Commission to calculate a Utilization Rate specific to the Base prior to the expiration of the twelve month Initial Utilization Rate period, but in no event will a Base subject to subdivision (a) of this section have a Utilization Rate lower than the aggregate Utilization Rate of all Bases subject to subdivision (a) for the twelve (12) months following the effective date of section 59B-24 of these Rules.

Ex. H to Shudofsky Aff. at 30.

93. The amendment, however, does not alleviate the potentially severe effects of the driver pay formula's utilization component, which the TLC did not even study. First, the industry-wide rate *only applies for the first twelve months of the rule*. This means that starting February 1, 2020 the utilization rate will no longer be pegged to the industry-wide rate, and the

dangers posed by the winner-take-all scenario will be unchecked. Of much more immediate urgency, however, the rule provides that even during the initial twelve-month period, a company with a utilization rate higher than the industry-wide rate can petition the TLC to use its company-specific rate—thereby exposing others in this four-company market to monopolistic and inequitable forces. *Id*. On day one that the rule takes effect, it could thereby allow for different utilization rates for different companies. In fact, TLC's website already indicates that on February 1, 2018, Via will use its own company-specific utilization rate and will be subject to lower per-minute and per-mile minimums than the other three companies, including Petitioners. *See Driver Pay Rates*, TLC, http://www.nyc.gov/html/tlc/html/industry/driver_pay_rates.shtml. The threat to companies with lower utilization rates posed by the Minimum Payment Rule is therefore immediate.

94. On December 4, 2018, the TLC adopted the Minimum Payment Rule by a vote of 8 to 1. Transcript of Taxi & Limousine Commission Meeting, Taxi & Limousine Commission (Dec. 4, 2018), at 5:9-12 (attached to Shudofsky Aff. as Ex. P). The rule is set to go into effect on February 1, 2019.

E. PARROTT AND REICH PUBLISH THE SUPPLEMENTARY REPORT

95. On January 16, 2019—over six weeks *after* the TLC passed the Minimum Payment Rule—Parrott and Reich, along with doctoral students Jason Rochford and Xingxing Yang, published a nine-page revision to the P&R Study[6]. The Supplemental Report contained revisions to the expense estimates utilized in the P&R Study and, for the first time, an earnings analysis purportedly based on applying the Minimum Payment Rule on a per-trip basis. This after-the-fact attempt to create some kind of support for the Per-Trip Calculation Requirement is

[6] The Supplemental Report is attached to the Shudofsky Aff. as Ex. Q.

woefully deficient; in fact, it provides no such support, suffering from the same deficiencies as the original study.[7]

96. Specifically, the simulation model in the Supplemental Report uses an assumed increase in *weekly* aggregate gross pay. It does not analyze how driver earnings would be affected by the Per Trip Calculation Requirement. Accordingly, none of the simulations in either of the two P&R reports actually incorporate the Per Trip Calculation Requirement of the Minimum Payment Rule that they purport to analyze. The Supplemental Report, moreover, suffers from the same core economic flaws that render the P&R Study inherently unreliable.

* * * *

97. Petitioners, having been rebuffed by the TLC in their requests to amend the Minimum Payment Rule, commence this action seeking to vacate and annul the rule on grounds that it is affected by an error of law and is arbitrary and capricious.

ARGUMENT

A. LEGAL STANDARD

98. An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CLPR § 7803(3).

99. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *New York State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991) (internal citation omitted). "The

[7] In addition to being outside of the administrative record, the TLC failed to produce the Post-Rule Revision to Petitioners notwithstanding Petitioners' December 14, 2018 FOIL request for "[a]ll reports, analyses, memos or other documents, including all drafts and versions of each, prepared by Dr. James A. Parrott of the Center for New York City Affairs, New School, Dr. Michael Reich of the University of California, Berkeley, and/or any other outside expert or consultant retained by the TLC in connection with the [Minimum Payment Rule]." Foil Request Form (Dec. 14, 2018), at 2 (attached to Shudofsky Aff. as Ex. R).

arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." *Ahmed v. City of New York*, 44 Misc. 3d 228, 236 (N.Y. Sup. Ct. 2014) (internal citation and quotations omitted). An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or "a rational basis" in the record. *Pell v. Bd. of Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co.*, 34 N.Y.2d 222, 231 (1974) (citing *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)).

100. A regulation must be vacated and annulled if an agency promulgates a regulation that conflicts with a local law or a statute. *See, e.g.*, *Leone v. Blum*, 73 A.D.2d 252, 257 (2d Dep't 1980), *aff'd sub nom. Delmar v. Blum*, 53 N.Y.2d 105 (1981) (holding that agency determinations must be annulled because they violated state and federal statutes). Similarly, if an agency bases a regulation on a flawed study, the regulation must be vacated and annulled as arbitrary and without basis in the record. *See Natural Resources Defense Council v. EPA*, 808 F.3d 556, 574 (2d Cir. 2015) (finding the EPA's unwillingness to develop information as part of the study performed by the EPA concerning a key regulatory alternative to be arbitrary and capricious and citing *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985), for the proposition that "agency action is arbitrary and capricious when based on a flawed study"); *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998) ("A regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study"); *see also Schur v. New York State Div. of Hous. & Cmty. Renewal*, 169 A.D.2d 677 (1st Dep't 1991) (finding agency action arbitrary and capricious where based on a flawed inspection report lacking relevant data).

101. Finally, it is "the settled rule that judicial review of an administrative determination is limited to the ground invoked by the agency . . . . If those grounds are

inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Matter of Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (internal citation omitted). This includes post-hoc rationalizations not contained in the administrative record. *Jan Jan Realty Corp. v. NYC Envtl. Control Bd.*, 160 A.D.3d 421, 322 (1st Dep't 2018); *Molloy v. New York City Police Dep't*, 50 A.D.3d 98, 100 (1st Dep't 2008).

102. Here, the TLC ran afoul of these principles in adopting the Minimum Payment Rule by, among other things: (i) failing to permit bases to calculate driver earnings on a *per-week* basis, in direct conflict with Local Law 150; (ii) arbitrarily permitting the calculation of driver earnings on a per-hour basis, but not also on a per-week basis; (iii) lacking any basis in the record for imposing the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option; (iv) promulgating a rule that is not rationally related to the TLC's stated goal of increasing overall driver pay (and that will not accomplish that goal); (v) basing the rule on the fundamentally flawed P&R Study; and (vi) adopting a utilization rate component without any analysis of its consequences, including its potentially devastating anti-competitive effects within the ridesharing industry. Each of these infirmities provides an independent basis for vacating the Minimum Payment Rule.

B. THE TLC VIOLATED LOCAL LAW 150 BY PROMULGATING A RULE THAT DOES NOT PERMIT BASES TO CALCULATE DRIVER EARNINGS ON A PER-WEEK BASIS

103. It is axiomatic that an agency regulation cannot stand if it conflicts with a local law or statute passed by the legislature. CPLR § 7803(3); *see also Leone*, 73 A.D.2d at 257. Here, Local Law 150 expressly states that the TLC

> **shall not prevent payments to for-hire vehicle drivers from being calculated on** an hourly or **weekly basis**, or by any other method, provided that the actual payments made to such drivers

> are no less than the minimum payments determined in accordance with the method established by the commission.

Ex. E to Shudofsky Aff. at 1-2 (emphasis added).

104. The plain language of the local law thereby requires the TLC to permit bases like Petitioners to calculate pay to drivers on a per-week basis. Acting in derogation of that law, the TLC passed a rule that does not permit bases like Petitioners to calculate pay to drivers on a per-week basis, instead requiring that the calculation be made on a per-trip basis.

105. Prior to passage of the Minimum Payment Rule, the TLC amended the rule to include a per-*hour* calculation option:

> *Hourly Payments*. If a Base subject to this section pays drivers on an hourly basis, the payment the Driver receives for each hour the Driver accepts dispatches from the Base must be at least the sum of the Per Mile Rate for all miles the Driver transported Passengers during the hour, the Per Minute Rate for all minutes the Driver spent transporting Passengers during the hour, and the Shared Ride Bonus for each applicable pick up performed during the hour.

Ex. H to Shudofsky Aff. at 29. This option allows companies to apply the per minute rate in the Minimum Payment Rule to all minutes in an hour, and the per mile rate to all miles in an hour, without requiring *each* trip to meet a minimum payment requirement. As long as the minimum payment amount is achieved on an hourly basis (without regard to any individual trip), the rule is satisfied. This is precisely what Petitioners asked the TLC to include in the rule, but on a per-*week,* in addition to a per-hour, basis—according to the express requirement of Local Law 150.

106. The TLC's inclusion of a per-hour calculation option is an acknowledgement by the TLC that the NYC Council did not require a per-trip calculation. Indeed, directly to the contrary, Local Law 150 required the TLC to permit the calculation of driver earnings on *both* a per-hour *and* per-week basis. As a result, the Minimum Payment Rule conflicts with the requirements of Local Law 150 and must be vacated and annulled as contrary to law.

C. PERMITTING CALCULATION OF DRIVER EARNINGS ON A PER-HOUR BASIS WHILE NOT PERMITTING THE CALCULATION ON A PER-WEEK BASIS WAS ARBITRARY AND CAPRICIOUS

107. The TLC's failure to permit a per-week calculation option is not just contrary to law, but also without a basis in the record and arbitrary. The TLC provided no explanation of its failure to do so either in the promulgation of the final rule or otherwise in the record. Indeed, the only clue to its thinking on this issue came in an off-the-cuff comment made by Chair Joshi at the October 3 public hearing regarding the then-proposed Minimum Payment Rule. At the hearing, Commissioner Joshi attempted to explain the language in Local Law 150 requiring the TLC to permit the calculation of driver payments on a per-hour and per-week basis as "a reference to the model, such as Via's, where [drivers] are paid on an hourly basis. But that doesn't speak to the standard by which you judge compliance of a pay protection proposal." Ex. O to Shudofsky Aff. at 104:8-13.

108. Commissioner Joshi's statement is revealing. It confirms that there was no coherence to the TLC's interpretation of Local Law 150. Dismissing the NYC Council's requirement to permit both a per-hour and per-week calculation option as a "reference to the model, such as Via's, where they are paid on an hourly basis" makes no sense. It ignores the fact that the local law requires the TLC to permit not just a per-hour calculation option, but a per-week calculation option as well. Commissioner Joshi offered no rationale, nor is there one in the record, for permitting a calculation as to one while *prohibiting* a calculation as to the other.

109. The TLC's inclusion of an option to calculate driver earnings on a per-hour basis but not on a weekly basis has no rational basis. That choice was arbitrary (in addition to contravening local law), and the rule should be struck on this basis as well.

D. THERE IS NO SUPPORT IN THE RECORD FOR REQUIRING THE CALCULATION OF DRIVER EARNINGS ON A PER-TRIP OR PER-HOUR BASIS TO THE EXCLUSION OF A PER-WEEK PAYMENT CALCULATION OPTION

110. While the direct conflict between the Minimum Payment Rule and Local Law 150 is a sufficient basis upon which to vacate and annul the Minimum Payment Rule (as is the arbitrary distinction between a per-hour and a per-week calculation), the rule should also be struck down because there is no support in the record for the TLC's selection of the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option.

111. **First**, the P&R Study contains no discussion or analysis of the effects that the Per-Trip Calculation Requirement (or any time period for a calculation requirement) will have on overall driver earnings, riders, congestion, or the bases (like Petitioners) that are subject to the Minimum Payment Rule. Tucker Report at ¶¶ 79-80. Indeed, Parrott and Reich paid almost no attention to the concept of a time period for the payment calculation, and in the few instances where the need for such a time period was discussed, the authors never suggested that the Per-Trip Calculation Requirement is either the optimal standard for such requirement or even a desirable one. They certainly did not suggest that it would be necessary or even useful in effectuating the purpose behind their payment formula. In fact, as discussed previously, Parrott and Reich did not reference the Per-Trip Calculation Requirement in the P&R Study and instead noted that "FHV bases would be required to ensure that drivers to whom they dispatch trips do not fall below these minimums **over a set period of time**." *See* P&R Study at 3 (emphasis added). In another part of the study, Parrott and Reich actually suggested that the appropriate standard for such calculation is *not* per-trip, but rather on a weekly or monthly basis:

> Generally, for a set time period **(such as a week or a month)**, companies will evaluate each driver's earnings using the total trip mileage and trip minutes for that company. If the compensation

> provided to a driver falls below the minimum pay standard, the companies will be required to make up the difference.

Id. at 36 (emphasis added). This is precisely what Petitioners requested from the TLC, *see* Exs. I, J, and K to Shudofsky Aff., and what is mandated by Local Law 150.

112. Further, had Parrott and Reich actually analyzed the effects of the Per-Trip Calculation Requirement, they would have found, as Dr. Tucker did, that such a requirement is likely to disproportionately affect rider fares and result in a decrease in the total number of trips, harming drivers and reducing the overall efficiency of ridesharing platforms. Tucker Report at ¶ 142. This is likely to occur because the increase in driver earnings caused by the Per-Trip Calculation Requirement is higher than the current commission rates for at least some of the ridesharing companies. As a result, any economically rational profit-maximizing company will increase its rider fares so as to not take a loss on such rides. *Id.* at ¶¶ 84-88. Even Parrott and Reich concede that an increase in rider fares will result in a decrease in demand, thereby hurting drivers. P&R Study at 57 ("If passenger fares rise, the consumer demand response is likely to reduce the number of trips demanded. Driver trips and pay will decline accordingly").

113. Parrott and Reich also would have found that, contrary to the intent of the TLC, the Per-Trip Calculation Requirement will result in ***increased congestion*** by incentivizing drivers to take shorter trips in areas of higher demand. Tucker Report at ¶¶ 135-140.

114. **Second**, there is no other support in the record for the imposition of the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option. No written submissions or testimony at the October 3, 2018 public hearing provide a basis for such a rule. Indeed, with the exception of Petitioners' written submissions to the TLC concerning the need for a per-week calculation option, *see* Ex. K to Shudofsky Aff., and the submissions of other

ridesharing companies making similar points, the written submissions to the TLC do not address this issue at all.

115. A particularly relevant exchange concerning the Per-Trip Calculation Requirement at the October 3, 2018 hearing occurred between Chair Joshi and Lyft VP Okpaku. *See* Ex. O at 103-106. During the exchange, Chair Joshi claimed that her concern with a per-week calculation requirement as opposed to the Per-Trip Calculation Requirement was that "with a per-week [ ] you will then have incentives that are used to help you reach the minimum, rather than when you're judged on a per-trip you have to pay incentives on top of the minimum." *Id*. at 104:18-23. Chair Joshi's rationale for not including a per-week calculation option (despite being required to do so under Local Law 150) is nonsensical. Money is fungible. There is no difference between paying drivers via incentive or by any other method if in the end the target amount set by the Minimum Payment Rule is achieved, and ridesharing companies like Petitioners already utilize incentives on a per-trip basis. The Chair's misguided take on how incentives are used does not lend any support to the TLC's imposition of the Per-Trip Calculation requirement to the exclusion of a weekly calculation option.

116. Further, Councilmember Lander, the prime sponsor of Local Law 150, emphasized the importance of allowing bases such as Petitioners to utilize incentives:

> [If] we can have cars deployed in places **with incentives from the companies** where we need the service then we can achieve the goal not just of the service we have today but of improved service for all New Yorkers especially outside the central business district and in the outer boroughs in a way that also functions to limit congestion and boost driver pay.

Transcript of Meeting, Committee on For Hire Vehicles (Aug. 8, 2018), at 15:14-21 (attached to Shudofsky Aff. as Ex. S) (emphasis added). In short, not only does nothing in the record support

the TLC's per-trip calculation requirement, but by limiting Petitioners' ability to effectively use incentives, the Minimum Payment Rule runs counter to the purposes of Local Law 150.

117. **Third**, the formula developed by the TLC in conjunction with Parrott and Reich is targeted toward the TLC's goal of establishing a minimum floor for payment to drivers of $17.22 an hour—a figure specifically selected by the TLC as the independent contractor equivalent of a $15 per-hour minimum wage (with some additional compensation for paid time off). Ex. H at 3-4. But imposing the Per-Trip Calculation Requirement—unlike an earnings calculation over a longer time period— necessarily overshoots that target. Tucker Report at ¶¶ 130-32. For each single trip, a driver will be at least at the target, which means that for any longer time period, such as a week, the driver will necessarily be above the target of $17.22 per hour on average. *Id*. That is so because a Per-Trip Calculation Requirement will require that each trip be at or above the pro-rated portion of the $17.22 minimum an hour and not allow for the aggregation or averaging out of trips over a period of time. Accordingly, the Per-Trip Calculation Requirement is aimed not to reach the goal but to overshoot it, and there is no analysis in the record of the effect that will have on the industry.

118. In short, the P&R Study did not provide a reasonable analysis of the effect that the Minimum Payment Rule will have on driver earnings, riders, and the ridesharing companies because it completely ignored the effects of the Per-Trip Calculation Requirement imposed by the TLC.

119. Nor does the Supplemental Report remedy the flaws in the P&R Study. As a threshold matter, the report was published *after* passage of the rule and is therefore outside of the administrative record upon which the Minimum Payment Rule was based. *See Jan Jan Realty Corp.*, 160 A.D.3d at 422; *Molloy*, 50 A.D.3d at 100. In any event, the report does not support

the rule. In addition to being plagued by the same flaws as the initial study, the purported new study does not even incorporate the Per-Trip Calculation Requirement into its simulation model, which is pegged to weekly earnings. In other words, it makes no attempt to actually analyze the Per-Trip Calculation Requirement and accordingly can provide no support for it.

* * * *

120. For all these reasons, the Minimum Payment Rule is unsupported by the record and is the product of arbitrary and capricious rulemaking. It was incumbent upon the agency to conduct its diligence *before* passage of the rule—to learn the facts, analyze the issues, and reasonably consider the evidence presented so as to exercise its rulemaking authority reasonably and appropriately. The TLC did not function here consistent with its responsibility, and the Minimum Payment Rule should therefore be annulled. *See, e.g., Ahmed v. City of New York*, 129 A.D. 3d 435, 441 (1st Dep't 2015) (holding TLC rule invalid because there was no basis in the record for a $10 million funding figure); *Metropolitan Taxicab Bd. of Trade v. N.Y.C Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 333 (2011) (striking down TLC rule prohibiting taxicab lessors from collecting sales tax from taxicab lessees, in part because the TLC did "not present[ ] any justification with any support in the record for its decision"); *Trump on Ocean, LLC v. Cortez-Vasquez*, 76 A.D.3d 1080, 1083, 1085 (2d Dep't 2010) (affirming reversal of agency action where trial court "conclude[ed] that the [agency]'s reasoning was based upon misapprehensions of fact and was contradicted by the evidence," on the basis that the agency determinations "disregarded the facts or [were] irrationally speculative"); *see also Application of Gorham*, 86 A.D.2d 505, 506 (1st Dep't 1982) (Fein, J., concurring) (overturning agency action on basis that agency respondents "[chose] to ignore the evidence and merely rely upon their general authority to administer" the programs it oversaw); *Thomas v. Blum*, 88 A.D.2d 601, 602

(2d Dep't 1982) (affirming decision to overturn agency's denial of public assistance due in part to there being "no evidence that [the] agency ever investigated or offered to investigate" petitioner's claims).

E. THE MINIMUM PAYMENT RULE AND THE PER-TRIP CALCULATION REQUIREMENT UNDERMINE THE TLC'S STATED GOAL OF RAISING OVERALL DRIVER PAY

121. The Minimum Payment Rule is also arbitrary and capricious because it undermines the TLC's stated goal of raising overall driver pay. As recognized by the TLC's own study, it cannot be assumed that a mandate to establish minimum per minute and per mile rates will increase overall driver earnings, which do not accrue in a vacuum separate from the laws of economics. The P&R Study itself recognizes that an "effective pay policy" must prevent a reduction in driver trips per hour and that "[i]f passenger fares rise, the consumer demand response is likely to reduce the number of trips demanded" and thus the earnings opportunities for drivers. P&R Study at 49, 57. When the errors in Parrott and Reich's "simulation" are corrected, it predicts that the Minimum Payment Rule will in fact reduce the number of trips demanded and result in increased passenger fares. Tucker Report at ¶¶ 96-101.

122. While drivers could make more money per-trip under the Minimum Payment Rule, they likely will be worse off overall because the per-trip and per-hour payment calculation requirement hampers Petitioners' ability to dynamically price trips based on rider demand (*e.g.*, by providing lower cost fares during off-peak times), resulting in increased trip costs and lost rides. Dr. Tucker concludes that the Per-Trip Calculation Requirement will "disproportionately" affect rider fares for certain trips—likely shorter distance trips—leading to a decrease in the total number of trips. *Id*. at ¶ 142.

123. In sharp contrast, a per-week payment calculation option would provide bases with the flexibility needed to account for both peak and off-peak ride periods, lessening the

impact of the rule on riders and keeping off-peak trip demand stable. Dr. Tucker concludes that a per-week calculation option would give the industry "the flexibility to find the least disruptive way of changing driver payments and passenger fares to cover the cost" of the Minimum Payment Rule because, unlike the Per-Trip Calculation Requirement, a per-week calculation option would not impose payment increases on trips without regard for which trips have a high enough level of demand to support such an increase. *Id*. at ¶ 154.

124. Finally, the P&R Study, by its own admission, also failed to analyze the likely combined impact on fares of the proposed earnings rule and a congestion surcharge per trip imposed by the state beginning in 2019. P&R Study at 57, n. 60 ("The effects are not part of our analysis"). The failure to account for how an already-passed 20% fare increase will interact with the Per-Trip Minimum Payment Rule is inherently arbitrary.

125. At bottom, there is no rational relationship between the stated goal of the rule—increased overall driver pay—and the imposition of a per-trip calculation, which will only hamper the achievement of that goal.

F. THE MINIMUM EARNINGS FORMULA PROMULGATED BY THE TLC IS BASED ON THE FLAWED P&R STUDY

126. Independent from the infirmities specific to the Per-Trip Calculation Requirement, the Minimum Payment Rule is arbitrary and capricious in that the sole basis in the record for the formula at the heart of the rule is the fundamentally flawed P&R Study. That study, fatally deficient as it is, cannot support the rule. *See Natural Resources Defense Council*, 808 F.3d at 574 (finding the EPA's unwillingness to develop information as part of the study performed by the EPA concerning a key alternative to a regulation promulgated by the agency to be arbitrary and capricious and citing *Humana*, 753 F.2d at1583 (10th Cir. 1985) for the proposition that "agency action is arbitrary and capricious when based on a flawed study"); *Tex.*

Oil & Gas Ass'n, 161 F.3d at 935 ("A regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study"); *see also Schur*, 169 A.D.2d at 677 (finding agency action arbitrary and capricious where based on a flawed inspection report lacking relevant data).

127. Here, the P&R Study is flawed for a multitude of reasons.

128. **First**, the study lacks a "sound economic methodology" and contains "fundamental mistakes that lead Parrott and Reich to reach erroneous conclusions." Tucker Report at ¶¶ 38-39. For example, the P&R Study erroneously estimates key inputs to its analysis, including driver gross earnings, working time, and expenses. *Id.* at ¶ 39.

129. **Second**, the "simulation" (which is in fact not a simulation but a set of assumed outcomes, the validity of which were not tested) did not take into account the Per-Trip Calculation Requirement, a core component of the TLC rule.

130. **Third**, Parrott and Reich relied upon flawed assumptions in putting together their "simulation" to examine the impact of the Minimum Payment Rule on drivers, riders, and the ridesharing companies. *Id.* at Section IV.C. The simulation ignores basic economic principles regarding supply and demand by predicting that riders will purchase *fewer* trips, while at the same time drivers supply *more* trips. *Id.* at ¶¶ 92-94. Nonetheless, in all of the scenarios considered in the P&R Study, Parrott and Reich predict that drivers are likely to increase the number of hours they work and receive more trips per hour, while they also predict that demand for trips will drop if rider fares increase (as they do in all but one scenario considered by the study). This conclusion is *impossible,* as it would mean that the number of trips *supplied* is greater than the number of trips *demanded*. When demand is properly accounted for (including its effect on utilization, explained *supra* ¶¶ 64-73), gross driver earnings actually decrease under

the scenario in the P&R Study—Scenario G—that a rational profit maximizing company is most likely to choose. *Id.* at ¶ 101.

131. **Finally**, equally flawed is the P&R Study's assumption that it is rational to require industry members like Petitioners to simply absorb the costs of the rule. Parrott and Reich suggest that Petitioners will need to lower their fees by approximately 50% to 80%. P&R Study at 59, 60. Dr. Tucker concludes that the P&R Study's assumption that "such decreases in commission rates are possible, let alone 'plausible,' lacks any basis in economics." Tucker Report at ¶ 112. Further, Parrott and Reich "dismiss entirely" the scenario in their study in which ridesharing companies maximize their profits (scenario G)—a scenario that assumes the highest commission rates for ridesharing companies, but at the same time assumes the highest increase in rider fares (a 10% increase) and a decrease in driver earnings. *Id*. at ¶ 101; *see also* P&R Study at 61. As Dr. Tucker explains, it was unreasonable to simply dismiss this scenario, since it is most in line with ride-sharing firms' profit-maximizing incentives. Though Parrott and Reich dismiss it, their own "simulation" predicts that the most likely outcome of the Per Trip Minimum Payment Rule will be a steep rise in rider fares, a fall in available hours of work for incumbent drivers, and no benefit to drivers in the form of higher earnings.

G. THE SELECTION OF A COMPANY-SPECIFIC UTILIZATION RATE WITHOUT ANY ANALYSIS OF ITS CONSEQUENCES, INCLUDING ITS POTENTIALLY DEVASTATING ANTI-COMPETITIVE EFFECTS ON THE RIDESHARE INDUSTRY, WAS ARBITRARY

132. As discussed *supra*, before passage of a rule an agency is required to learn the facts, analyze the issues, and reasonably consider the evidence presented so as to exercise its rulemaking authority reasonably and appropriately. *See*, *e.g., Metropolitan Taxicab Bd. of Trade*, 18 N.Y.3d at 333 (striking down TLC rule prohibiting taxicab lessors from collecting sales tax from taxicab lessees, in part because the TLC did "not present[ ] any justification with

any support in the record for its decision”). Here, the TLC failed to consider the devastating effects the selection of a company-specific utilization rate will have on drivers, riders, and ridesharing companies. Tucker Report at Section VI.

133. Had they undertaken an analysis, it would have found, as Dr. Tucker notes, that the use of company-specific utilization rates protects “large incumbents” by ensuring that “their smaller rivals have higher per trip costs,” and thus increased operating expenses. *Id*. at ¶ 156. This hurts competition in the industry by allowing a large incumbent to cut prices (due to lower operating costs) to a level that the smaller companies may not be able to match, which in turn causes the smaller companies to lose riders and their utilization rates to decrease still further, creating an even greater disparity in the industry. *Id*. at ¶ 166.

134. Dr. Tucker depicts the above as a “vicious cycle” that will result in “increasing market concentration” and thus reduced competition. *Id*. This reduced competition will be detrimental to the entire industry—drivers, riders, and rideshare companies—except for the large company that is able to leverage its competitive advantage. Less competition means less competition for drivers and, as a result, less competition to reduce rideshare company commissions. It also means less competition for riders and increased fares, which in turn means lower demand for rides and less work and reduced earnings for drivers. *Id*. at ¶ 157. In other words, only a single player in the market will benefit under this scenario.

135. To the extent the TLC did recognize the anti-competitive effects of the Minimum Payment Rule, its amendment to the rule just prior to passage, establishing an industry-wide utilization rate for the first twelve months the rule is in effect, is woefully insufficient. First, the application of the industry-wide rate during the initial twelve-month period is at best a temporary fix that does not remedy the anti-competitive effects that will be inflicted after this period ends.

Second, even during the initial twelve-month period, companies with utilization rates higher than the industry-wide rate can petition the TLC to use their rates. Indeed, one of the four companies subject to the rule—Via—has already done so. Companies with lower utilization rates accordingly remain at risk, facing the threat of a serious competitive disadvantage as a result of the company-specific utilization component of a Minimum Payment Rule whose effects were never considered by the agency.

FIRST CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

136. Petitioners repeat and reallege the allegations made in paragraphs 1 through 135 above as if fully set forth in this paragraph.

137. Imposing the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option directly conflicts with Local Law 150 and its requirement that the TLC "not prevent payments to for-hire vehicle drivers **from being calculated on** an hourly or **weekly basis**." Ex. E to Shudofsky Aff. at 1 (emphasis added).

138. For at least this reason, the Minimum Payment Rule is affected by an error of law and Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

SECOND CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

139. Petitioners repeat and reallege the allegations made in paragraphs 1 through 138 above as if fully set forth in this paragraph.

140. The TLC's adoption of the NYC Council-required per-hour calculation option but *not* the similarly required per-week calculation option was arbitrary and without basis in the record.

141. For at least this reason, the Minimum Payment Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

THIRD CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

142. Petitioners repeat and reallege the allegations made in paragraphs 1 through 141 above as if fully set forth in this paragraph.

143. The record does not support the imposition of the Per-Trip Calculation Requirement to the exclusion of a per-week payment option. The P&R Study is completely devoid of any analysis of the effects that the Per-Trip Calculation Requirement will have on driver earnings, FHV bases, and the industry in general.

144. Further, the record beyond the P&R Study is similarly devoid of support for the Per-Trip Calculation Requirement to the exclusion of a per-week calculation option. No written submissions or testimony at the October 3, 2018 public hearing provide a basis for such a rule.

145. For at least these reasons, the Minimum Payment Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

FOURTH CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

146. Petitioners repeat and reallege the allegations made in paragraphs 1 through 145 above as if fully set forth in this paragraph.

147. The Minimum Payment Rule will not result in an increase in overall driver pay. There is therefore no rational relationship between the purpose of the rule and the means selected to achieve that purpose. For at least this reason, the Minimum Payment Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

FIFTH CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

148. Petitioners repeat and reallege the allegations made in paragraphs 1 through 147 above as if fully set forth in this paragraph.

149. The Minimum Payment Rule, based as it was on the fundamentally flawed P&R Study, has no support in the record, rendering its imposition arbitrary and capricious. For at least this reason, the Minimum Payment Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

SIXTH CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

150. Petitioners repeat and reallege the allegations made in paragraphs 1 through 149 above as if fully set forth in this paragraph.

151. The TLC's adoption of the utilization rate component of the driver pay formula was without support in the record. No analysis was done of its likely effects, including its severely anti-competitive effects within the ridesharing industry. For at least this reason, the

Minimum Payment Rule was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

PRIOR APPLICATION

152. No prior application has been made for the relief requested herein.

TRIAL DEMAND

153. Petitioners demand an evidentiary hearing on all causes of action so triable.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter an Order:

A. Issuing a judgment pursuant to CPLR § 7806 vacating and annulling the Minimum Payment Rule, codified at 35 R.C.N.Y. §§ 59B-24, in its entirety;

B. Holding an evidentiary hearing to resolve any material factual disputes;

C. Ordering Respondents to pay Petitioners their costs, fees, and disbursements incurred in connection with this action pursuant to CPLR § 8101; and

D. Granting such other and further relief as the Court deems just and proper.

Dated: January 30, 2019
New York, New York

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF QUEENS)

Ann Ferracane, being duly sworn, states that she is the President, Secretary and Treasurer of Tri-City, LLC and Endor Car and Driver, LLC, Petitioners in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief; and as to those matters, she believes them to be true.

Sworn to before me this

30th day of January, 2019

K. Falcon

NOTARY PUBLIC

KEITH FALCON
Notary Public - State of New York
No. 01FA6265135
Qualified in Kings County
My Commission Expires November 4, 2020